No. 3626

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

N. A. SLATER and BANK OF ALASKA,
Appellants.

vs.

A. E. LATHROP and ALICE JOHNSON,
Appellees.

BRIEF OF APPELLEES.

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THE RECORDER COMPANY, 669 STEVENSON ST., S. F.

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For convenience, the parties will be designated herein as they were in the court below. All references, unless otherwise specified, refer to pages of the printed record.

STATEMENT.

This is an appeal from a decree granting an injunction restraining the defendants from obstructing Burkhart Alley in Block 7, Cordova, Alaska.

Block 7 is bounded on the west by First Street (the chief business street of the town); on the east by Second Street; on the south by B Street, and on the north by C Street. The block is bisected from north to south by an alley which was laid out when the

townsite was platted the same as the streets mentioned. Burkhart Alley, the subject of the litigation, cuts through Block 7 easterly and westerly from First Street to Second Street near the center of the block. Plaintiff Lathrop owns a large building on the west side of First Street just opposite Burkhart Alley, and there is a cross-walk extending over First Street from the end of Burkhart Alley to the Lathrop Building; a portion of the Lathrop Building is occupied by a moving picture theater. The other plaintiff, Alice Johnson, is in possession of a building and lot 22x100 feet located on the southwest corner of Burkhart Alley and Second Street. This property she is purchasing on the installment plan, and she has paid most of the purchase price. The building is subdivided into twelve apartments used for residential purposes.

Defendants are the owners of lots 7 and 8 in block 7. These lots face on First Street, and flank Burkhart Alley on either side for a distance of 100 feet. The alley is 8 feet wide and the second floors of the buildings adjoin so that they cover the passageway completely from its intersection with the regular alley to First Street. The balance of Burkhart Alley, from the regular alley to Second Street is open overhead, except for an elevated walk along the south side about two feet wide used by tenants of the plaintiff Alice Johnson.

The plaintiffs assert that Burkhart Alley is a public thoroughfare, and that they have the right to travel over it, as over any other street in Cordova, and further, that owing to the position of their respective holdings, they would suffer special damage not suf-

fered by the general public if the alley were closed. The defendants contend that Burkhart Alley is a private way, left open by the abutting property owners when they built their buildings, with the understanding that it might be closed up at will. The alley in controversy was opened up in October, 1908, and the defendants attempted to close it in August and September, 1919, but were enjoined by the plaintiffs.

THE EVIDENCE.

There is little conflict in the evidence. The plaintiffs' witnesses testified that in 1908 the owners of the two lots on the south side, and the owners of the two lots on the north side of Burkhart Alley, comprising the entire frontage between First and Second Streets, agreed to leave eight feet of space between their respective buildings, four feet off of the side of each lot, for an alleyway. Finkelstein, a witness for defendants (Tr., p. 288), testified: "We all had an understanding that the buildings should be so erected as to leave an eight-foot alleyway, that there should be such an alleyway between the buildings for our use. I do not recall all the details of the conversations." It was his understanding that the alley was to remain open unless *all* the abutting property owners agreed to close it. (Tr., pp. 292-295-296.) It was for the convenience of all. Ashland and other witnesses for the defendants all testified there was such an agreement between the abutting lot owners, but Ashland (Tr., p. 223) claimed that there was an understanding that the alley might be closed by any owner. Witness Harwood (Tr., pp. 134-135) testified that Burkhart

(one of the original owners of abutting property) had stated when the witness was leasing property on the alley that, "he (Burkhart) and Bob Ashland (who owned the lot adjoining) had agreed to keep that open, and that they entered into an agreement to donate four feet all the way through on the alley." (See, also, Tr., p. 150.) Pursuant to the agreement the buildings on either side of Burkhart Alley from First Street to Second Street were, in 1908, set back four feet—that is, the first floors. The second floors of the buildings facing on First Street each extended four feet over the alley, thus covering it for a distance of one hundred feet. The balance of the alley through to Second Street was left open, except for an elevated walk some two feet wide leading west from Second Street, and attached to the building on the south side of the alley. This situation created in 1908 remained unchanged until 1919. (Tr., pp. 64-67.) All the witnesses testified that the alley was used by the general public, passing through from First to Second Street. Some of the witnesses testified that travel for a number of years was greater through Burkhart Alley than on B and C Streets, which extend from First to Second Streets on either side of block 7. (Tr., pp. 67, 109, 173, 190, 195, 255.) There is no evidence denying this use by the public. Prior to August or September, 1919, the defendants or their predecessors in title never made any objection to the public use of the alley. (Tr., pp. 74, 243.)

The public authorities exercised acts of control as follows:

Maintained lights in the alley. (Tr., pp. 102-

112-113-114-165-171-265-274-276.) Fire hydrants installed. (Tr., pp. 100, 103.) Repairs ordered. (Tr., pp. 121, 253, 276.) Used for fire apparatus. (Tr., pp, 115-116, 119.) Ordered kept clear for hose carts. (Tr., pp. 72, 118, 119.) Display windows along the side of the alley (Tr., pp. 117, 192) showed further use as a public way.

SPECIAL DAMAGE TO PLAINTIFFS.

Uncontradicted testimony showed that crosswalks on First Street in Cordova were maintained at the intersections of public streets (Tr., pp. 59, 60, 61, 62, 157); other crosswalks had been ordered removed. (Tr., pp. 158-159.) That the crosswalk at the western terminus of Burkhart Alley, extending across First Street to plaintiff Lathrop's building, was used by many persons, notably those patronizing the moving picture theater, located on his property. If Burkhart Alley were closed, and this walk removed, plaintiff Lathrop would be damaged. Lathrop testified that property of plaintiff, Alice Johnson, at Second Street and Burkhart Alley would be greatly damaged if the alley were closed. He testified (Tr., p. 64): "As the property stands now it is practically First Avenue property—it is accessible from First Avenue." "It is nearer to First Avenue, being able to use the alley." Q. "Being able to use Burkhart Alley?" A. "Yes sir." Plaintiff Alice Johnson testified that the value of her property would be reduced 25% to 50% if Burkhart Alley closed. (Tr., pp. 90, 91.) There was not evidence contradicting the testimony of these two witnesses.

On rebuttal both plaintiffs, Lathrop and Johnson, testified that in winter the "regular" alley running north and south through Block 7 was impassable for foot-passengers. (Tr., pp. 297-300, also 304, 311, 312.) All travel was through Burkhart Alley.

Miss Johnson also testified that she was influenced by and relied on the existence of Burhkart Alley as a public way when she contracted for the purchase of the property facing on Second Street and extending along the south side of the alley. (Tr., pp. 89, 90.) That it would be necessary to either use the "regular" alley extending from B to C Streets or go around Second Street to reach First Street if the alley were closed. (Tr., p. 91.)

STATUTES.

There are no provisions in the Alaska Codes or session laws governing dedication, or the laying out or acceptance of streets by municipal bodies.

The Alaska statute of limitations in actions involving the title or possession of real property is ten years, except in cases of adverse possession under color of title. In the latter class of cases the period is seven years.

ARGUMENT.

We contend that the evidence was sufficient to support the findings, as follows:

No. 7.—That Burkhart Alley was first opened up to public travel about October, 1908 (Tr. pp. 337-8), and it ever since has been used by the general public as a public highway and ever since has continuously

and without interruption, hindrance or permission of anyone been used as a public street, alley or highway by the general public and these plaintiffs. (Tr. pp. 337-8.)

No. 8.—That the Common Council of Cordova exercised rights of ownership, authority and control over Burkhart Alley without hindrance or objection or permission from anyone, by providing for lighting and by numerous other acts from the time when the town of Cordova was organized. (Tr. p. 338.)

No. 9.—That prior to August, 1919, none of the owners of the four lots abutting in Burkhart Alley ever claimed or contended that said alley was not a public highway. (Tr. p. 339.)

No. 6.—That the owners of the abutting lots agreed among themselves to open an alley 8 feet wide from First Street to Second Street in said town. (Tr. p. 336.)

No. 1.—That the plaintiffs are damaged in a manner special and different from the damage to the general public of the town of Cordova by acts and threatened acts of the defendants. (Tr. p. 333.)

Nos. 3 and 4.—That if defendants are permitted to obstruct Burkhart Alley the plaintiffs will be specially damaged thereby by causing a reduction in rental value of plaintiffs' buildings. (Tr. pp. 334-335.)

THERE WAS A DEDICATION.

The owners of the four lots abutting on the alley agreed to leave an open space between their buildings, and carried out the agreement. Neither the original owners nor those claiming under them will be allowed

to dispute the accomplishment of the dedication by oral testimony to the effect that the land was devoted to a public use, but with a mental or secret reservation that it might be withdrawn from such public use. Dedication arises from acts, and requires no written instrument to transfer title. When property has once been turned over to the public it cannot be recalled. True, an intention on the part of the owner to part with his property must exist, but this intention will be presumed from the acts of the owner. The trial court has found there was an agreement to open this alley, and the evidence is uncontradicted that the alley was opened up and used for more than ten years by the public without objection from any of the abutting owners or without their giving any sign or hint that they claimed ownership. The dedication was an accomplished fact long before the defendants attempted in August and September, 1919, to close the alley.

Kennedy vs. *City of Portland,* 179 Pac. 667;
Evans vs. *City of Brookings,* 170 N. W. 133;
Schwerdtle vs. *Placer County,* 108 Cal. 589;
Leverone vs. *Weakley,* 155 Cal. at p. 400;
Humphrey vs. *Krutz,* 137 Pac. 806;
Robison vs. *Gebaur,* 152 N. W. 329.

Riley vs. *Buchanan,* (Ky.) 76 S. W. 527—

Leading case on almost all of the questions involved in the case at bar. The opinion reads, in part, as follows:

> "If, however, there is not an express dedication, but the owner suffers the public to use the passway, knowing it is claiming it as a matter or right,

the law presumes a dedication to the public, and presumes the dedicator's intention to be in accord with the public's uses. This does not depend upon whether there has in fact been a dedication to the public, but is founded upon the principles of *estoppel in pais.* If the real owner suffer the public generally to so use his land as a passway, under a notorious claim of right, for a great length of time, *whereby others may have been induced to buy property in that vicinity* relying upon the apparent right of the public to use this passway, and by which the purchase price of their lands may have been affected, it is unfair that the owner should be permitted to gainsay the truth of it. The law operates upon his conscience and makes effectual that which he has suffered for so long to appear to be so, by raising the conclusive presumption that he has actually done what he allowed the public to believe he had done—dedicated the passway to the use of the public." (Italics ours.)

This also is the law as laid down in McQuillan on Municipal Corporations.

4 McQuillan Mun. Corp., pp. 3196-3239-3242-3245.

Kennedy vs. *City of Portland,* 179 Pac. 667:

"The writer is unable to discover any logical reason for maintaining in the discussion any distinction between the acquisition of a highway by implied dedication and by prescription where the use has continued beyond the time fixed by the statute of limitations."

Hartley vs. *Vermillion,* 141 Cal. 339:

"When, as in this case, the public, or such portion of the public as had occasion to use the road,

> traveled over the same, with full knowledge of the landowners interested, without asking or receiving any permission, and without objection from anyone, for a period of time beyond that required by law to bar a right of action, a right in the public to the use of the road arises by prescription or implied dedication."

The rule as laid down in the California cases hereinbefore cited, to the effect that dedication is implied from long continued use, has been followed in *Sherwood* vs. *Ahart,* 35 Cal. App. 84,—the Court said:

> "The manner in which it became a public highway was through dedication by the owner and acceptance by the public. Such dedication is implied from the long and continuous use of said road with full knowledge of the land owners interested, without asking or receiving any permission, and without objection from anyone for a period of time beyond that required to bar the right of action. Under the authorities it must be held that the long-continued use, and with the acquiescence of the owners, raised the implication of dedication for such public purpose."

Chicago vs. Chicago R. R., 38 N. E. 768:

> "The rule doubtless is that the intent testified to, will not be permitted to prevail against unequivocal acts and conduct on the part of the owner inconsistent with such intent, and upon which the public has a right to rely."

See also:

Morgan vs. *R. R. Co.,* 96 U. S. 716;
City of Los Angeles vs. *McCollom,* 156 Cal. at 152-153.

In Rex vs. *Lloyd,* 1 Campbell 262, Lord Ellenborough said:

> "If the owner of the soil throws open a passage and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by a positive prohibition, he shall be presumed to have dedicated to the public."

There was an acceptance of the right of way dedicated.

Long continued use by the public is sufficient.

> *Riley* vs. *Buchanan,* 76 S. W. 527;
> *Robison* vs. *Gebauer,* 152 N. W. 329.

The various instances of control over the alley by public officials of Cordova, noted above in this brief in summary of evidence, also show the acceptance.

THE PUBLIC AND THE PLAINTIFFS IN THIS SUIT ACQUIRED BY PRESCRIPTION THE RIGHT TO PASS OVER AND THROUGH BURKHART ALLEY AS AGAINST THE DEFENDANTS.

The evidence clearly shows that the general public and these defendants commenced to use the alley in 1908 and that this use continued without interruption and without permission of anyone for more than ten years. This applies to tenants who have occupied the building now in the possession of plaintiff Alice Johnson. A right to use a street or way may be gained by prescription.

Humphrey vs. *Krutz,* 137 Pac. 807;
Dallenbach vs. *Burnham,* 94 N. E. 41.

In *Lockey* vs. *City of Bozeman,* 113 Pac. 286, the following language appears:

> "The facts bring this case clearly within the rule recognized generally—that a public highway may be established by prescription, without color of title, by proof of travel over it by the public, as a public highway, for the statutory period."

In *City of Seattle* vs. *Smithers,* 79 Pac. 615, the following:

> "A road or street that has been used by the general public adversely for the period of limitation for quieting title to land becomes a public highway by prescription." Syllabus.

THERE MAY BE A QUALIFIED DEDICATION.

For instance, the right in the public to pass over a field and a right in the owner of the fee to plow the land where the right of way is exercised.

Mercer vs. *Woodgate,* L. R. 5 Q. B. 26 (1869).

In *Atkins* vs. *Boardman,* 2 Metcalf, 457 (Mass.) it was held that the owner of land over which a passageway had been reserved might lawfully cover such passageway with a building if he left a space so high, wide, and light, that the way continued substantially as convenient as before for the purposes for which it was reserved.

See, also,

Gerish vs. *Shattuck,* 132 Mass. 235, and
In re Roosevelt Ave., 174 N. Y. S. 600, at 603.

THE PLAINTIFFS HAD THE RIGHT TO BRING THIS SUIT.

They suffered special injury in the use of their property.

Sherwood vs. *Ahart,* 35 Cal. App. 84, at p. 86, bottom;
Leverone vs. *Weakley,* 155 Cal. 401;
Cushing vs. *Wetmore Co.,* 152 Cal. 118.

Although plaintiff Alice Johnson had not completed the purchase of the property, she was nevertheless the owner of the equitable title, and was entitled to maintain this suit.

In re Roosevelt Ave., N. Y., 174 N. Y. S. 600, at 604.

FINDINGS AND CONCLUSIONS OF TRIAL COURT.

While the findings by the trial court are not binding upon this court on an appeal in equity, still weight should be given to them, and we urge that this is especially true in the present instance.

The trial judge (Tr., p. 200), in the course of the proceedings, made the following comment:

> "I have been going through there more or less since 1909 and have had occasion to observe it very carefully the last few days—the sidewalks, openings, etc. However, I shall be glad to look at it again."

It is evident that the court below was in an exceptionally good position to pass on the facts in this case.

Defendant Slater evidently fully realized the weakness of his position because, prior to the time when he obstructed the alley (September, 1919), he appeared before the Council of Cordova and asked if objection would be raised by that body if he should close the alley. (Tr. pp. 234-235-236.) Slater stands in the same position as the plaintiff in *Schwerdtle* vs. *County of Placer,* 108 Cal. 596, where the Court say: "The placing of gates in 1887 was rather an acknowledgment than a denial of the public right, since permission to erect them was first asked of a member of the board of supervisors."

The decree should be affirmed.

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